5 PROPERTY, PRIVACY, ACCESS AND EVIDENCE AS LEGAL AND SOCIAL RELATIONSHIPS

If we apply the law of obligations as defined in Chapter 3 to the relationships between parties in business transactions, recordkeeping provides evidence of the duties and obligations that arise from those relationships, and also whether the obligations have been met. The same body of law also provides bonds between participants and other stakeholders in records processes, for example third parties who need evidence of the transaction for legal or other purposes. The duties and obligations of recordkeeping participants include rights and obligations pertaining to ownership, access and privacy, as well as those of third parties, which in turn are evidenced by records providing proof of the existence of the rights and/or obligations. Legal and social relationships provide a way of focusing on the participants (physical and legal) in business and recordkeeping processes and their rights and obligations (ethical and legal), their associated property, contractual and access rights and obligations, and the evidence that records provide of those rights and obligations.

5.1 Property as a legal and social relationship

In the notion of legal and social relationships, property is a relationship between legal and moral persons, a 'right-duty thing' (thing as obligation, not as a material object, see 5.1.1 below) in which records provide evidence of the relationship, and its concomitant rights and obligations. Simon Fisher argues that the law of property, together with the law of obligations, promotes the interests of property owners, including owners of the records themselves. The rights of non-property holders to gain access to and in some cases to amend records that form part of a legal relationship can also be analysed in terms of duties and obligations, whether found in statutory or non-statutory law in common and civil law systems.

Property can be defined as power over resources, which creates relations between members of a society. It is a right to a flow of income, whether from rent, interest, profits, labour, service or goods. Thus it is not restricted to land or objects, for example when professions transform a service into income-yielding property.[1] Property in its many manifestations is a vexed question in ethical theories because it has been laid down as a requirement for 'reasonable' thinking. Essentially it means that one needs material resources to make reasoned decisions.

In the liberal democratic view one cannot pursue private interests without 'things' as vehicles for action, and private control.[2] A private property system is one in which rules governing access to and control of things assign them to particular individuals. The beneficiaries of property may not own it; they may depend on trust to have the interest upheld.[3]

5.1.1 Thing as material object and as obligation in property law

Property and ownership are complex legal concepts that have been characterised in Roman and common law systems through the nature of 'thing'.[4] The jurisprudential notion of thing has not always carried with it the restricted meaning of being the material object itself, but rather the thing, as the object of a right or duty, is a legal relationship. For example, a trademark may be a mark but is also a legal relation, that is, a thing with rights and obligations arising out of its first appropriation. A broader definition of thing by some jurists is 'any unity with economic value', for

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[1] Harold Perkin, *The Rise of Professional Society: England Since 1880,* London, New York, Routledge, 1989, p. 9.

[2] John Charvet, *The Idea of an Ethical Community*, Cornell University Press, Ithaca, New York and London, 1995*,* p. 198.

[3] Perkin, *The Rise of Professional Society: England Since 1880*, p. 124.

[4] 'Thing' originally meant a matter before a court; its residual use in evidence law is as 'document or thing', see for example in Australia, *Evidence Act* 1995 (Cth), s 146(1)(a), 'This section applies to a document or thing'. Michael Buckland in, 'Information as Thing', *Journal of the American Society for Information Science*, vol. 42, no. 5, June 1991, pp. 351-360, distinguishes information-as-thing as a tangible object, such as the document or data, from information-as-knowledge which is intangible, and cannot be touched or measured. Information as thing is extended to objects and events that are 'informative'. Using Buckland's typology a record is a thing from which one can infer knowledge in the form of rights and obligations.

example land or a service.[5] Things which have an economic value include copyrights, trademarks, and trade secrets, and in addition things can include bonds, rents, and services, none of which are material objects. Things of no direct economic value include corporeal integrity and the power to enter personal relations.[6] Thus certain kinds of legal things represent a right.

Based on the evolution of the Roman law division of *res mancipi* and *res nec mancipi* the common law system has divided property into real and personal; real property or immovables include land and fixtures, while personal property or movable property is all other than real property, which includes chattels such as things that are tangible, corporeal, such as a physical record, and things in action ('choses in action') which are assignable things (assignable in law and in equity) and are intangible, incorporeal things.[7] They cannot be possessed; they are merely evidence of the legal relation. It is in the personal property law of the common law system, that a thing as an object takes part in a property relationship.

Bruce Welling, in *Property in Things in the Common Law System,* defines property as a legal relationship, that is, a person that is a holder of a form of property is in a relationship with a person that is not a holder. There is also a third person (usually the state) that acknowledges the holder of the property and can suppress the use of the property by a non-holder. Property and thing are not the same concepts.[8] Some, but not all property is

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[5] Albert Kocourek, *Jural Relations*, 2nd edn, The Bobbs-Merrill Company, Indianapolis, 1928, p. 307. The Roman law of things was divided into *res corporalis* (land, chattels) and *res incorporalis* (servitudes, choses in action).

[6] Ibid., pp. 324-326.

[7] Ibid., p. 316. The Anglo-American division of real and personal property is the most extensive one used in law since the first property division in Roman law of *res mancipi* (for example agricultural substances and land) and *res nec mancipi* (for example money, clothing, tools). The next classification which came into use in Roman law and in the civil law of Europe was that of *res mobiles* (movables) and *res immobiles* (immovables). This classification attempted to state a natural difference in material substances, a categorisation synonymous with the division of the law of chattels and of land. Although the classification of movables and immovables can apply only to material substances, the law attempted for various purposes, for example taxation and rights, to give a local situation to 'thing' elements which in their nature have no situs.

[8] Bruce Welling, *Property in Things in the Common Law System*, Scribblers Publishing, Gold Coast Queensland, 1996, pp. 8-9; p.15. Welling disagrees with the common law lawyers that have made property and thing synonymous. He believes that people held property in things in the early common law only.

held in things. In contrast with the Roman concept of thing as obligation, 'thing' in common law is defined as 'a material object, a body; a being or entity consisting of matter, occupying space.'[9] For Welling there are four types of property in things: possession, right to immediate possession, ownership, and security interest.[10]

Property in the common law system denotes the relationship between a person and a thing while Roman law makes property an obligation, which is a relationship between two persons.[11] In the common law view the closest personal property concept to the Roman law of things are 'things in action' or 'choses in action' which are intangible property; a right that is 'owned' but cannot be physically transferred. They include shares and negotiable instruments which exist only through evidence of a right, that is records that prove the existence of the right, in any form, electronic or otherwise.[12]

Simon Fisher argues that the Australian law of property rests on the same principle as Roman law. In Roman law, the law of property is a category concerned with relations between people and things. He says:

> It is futile to speak of 'property' as a legal object (or *thing*) unless one can simultaneously point to those legal persons who are said to have an interest in property. The most important interest in property is 'ownership'. The concepts of 'property' and 'ownership' are an important part of the legal matrix underpinning the archival enterprise because a record (that is, a document produced in the course of practical activity) is itself a 'thing' in which legal persons (whether natural or juridical) have a relationship with.[13]

The obligation is not to a thing as object but between persons who are in a legal relationship with the thing. Ownership is an intangible thing which arises from the relationship between two persons and a thing. Thus property is a legal relationship. Rather than someone 'owning' a record, they have obligations arising from ownership. Rather than concentrating

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[9] Ibid., p. 1.

[10] Ibid., p. 44.

[11] Simon Fisher, 'General Principles of Obligations', in *The Law of Commercial and Professional Relationships,* ed. Simon Fisher, F.T. Law & Tax, South Melbourne, 1996, p. 19.

[12] A share exists only through proof of the right to the share; for example, a record of the share certificate is not the property itself, but evidence of a right to property. 'Things in action' are both obligations as well as items of property. Ibid., 18-20.

[13] Simon Fisher, 'The Archival Enterprise, Public Archival Institutions and the Impact of Private Law', *Archives and Manuscripts*, vol. 26, no. 2, Nov. 1998, p. 331.

on the record as object, it is 'the thing as relationship', or Kocourek's 'thing as a right', that is evidenced in the record that is the subject of ownership.

On the basis of the legal and social relationship model, it is possible to go further than Fisher's record as a thing as an object of obligation, to consider the record as a 'thing-persons-property relationship', that is both the right-duty thing itself and evidence of the property relationship; the evidence that the rights of ownership convey, that is to create, copy, keep, destroy the thing, and the duty of others not to interfere with the enjoyment of the ownership.

In summary, the common law system classifies intangible things as a form of personal property, whereas civil law systems classify them as obligations. Although the common law system defines the record as a physical object rather than as an obligation, it still forms the object of a legal relationship. It is therefore possible to define a record as a right-duty thing or obligation in both the civil and common law systems.

5.1.2 Ownership in common law systems

The common law never developed a theory of ownership, because its remedies for property matters were based on possession.[14] Property in a thing is the state's ability to restrict access to the thing. Ownership is also a form of property in things. A holder of ownership of a thing either holds possession of the thing which no one is at liberty to interfere with, or

[14] In common law, ownership as a term first appears in the nineteenth century. Possession, not ownership, had to be proved to get access to a common law remedy for property matters. This was partly due to the lack of documentary evidence of ownership. Thus written records have been important to proving ownership in a thing. Welling, *Property in Things in the Common Law System,* p. 11, footnote 21. Possession is both a fact and a right (claim). So long as possession operates on the basis of the claim to possess, the right of ownership remains incomplete. Ownership is the ultimate right of possession. The law does not deal with ownership apart from possession. Kocourek, *Jural Relations,* p. 328. Ownership and possession were originally regarded as inseparable concepts, with the possessor considered the owner. The separation of ownership and possession arose from owners having a right against the whole world, while the possessor held the right against whole world but one person, another claimant. There is also consensual possession where possession is by the owner's consent; without consent there may be adverse possession which may become ownership. William Edward Hearn, *The Theory of Legal Duties and Rights: An Introduction to Analytical Jurisprudence*, F.B. Rothman, Littleton Colorado, 1990 (1883), pp. 189-190; p. 197.

holds, or will, when a contract expires hold, right to immediate possession of the thing, while someone else holds possession or right to immediate possession after transfer.[15]

The right of ownership is not a single right and lawyers have had difficulties in defining it. The great tort lawyer, Antony M. Honoré, in his essay, 'Ownership', in *Oxford Essays in Jurisprudence*, identifies a full set of rights over things an individual may be endowed with. This includes the right to possess, use, consume or destroy, modify, manage, rent out and alienate.[16] William Hearn also concentrated on the rights of ownership, which included 'the right to possess, the right to use, the right to produce, the right to waste, the right to disposition, whether during life or upon death, and the right to exclude all other persons from any interference with the thing owned',[17] thereby avoiding using property as a form of ownership. For Hearn, property was defined as the thing owned, and ownership as the right over the property.

Rights of ownership place obligations on others; the right of exclusion places a duty on others not to enjoy the object of ownership.[18] The owner has a residuary right in the thing owned. 'Such a residuary right or interest exists once one subtracts from the totality of the rights in the property concerned the rights asserted, claimed or enjoyed by others'.[19] The exclusion of ownership does not necessarily exclude all property rights. Ideas cannot be owned, but one can have a property right to the idea. They are a subset of property rights.[20]

Proof of possession and custody (as detention)

Possession is a form of property in things. Possession is also a relationship. The record as thing may be possessed or may provide evidence of intention to possess. Possession comprises a *physical* and *mental* element. Case law includes the critical factor of intention. Possession is proved by the

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[15] Welling, *Things in the Common Law System,* pp. 30-35.

[16] Antony M. Honoré, 'Ownership', in *Oxford Essays in Jurisprudence*, ed. A.G. Guest, Clarendon Press, Oxford, 1961, pp. 107-147. Property may lead to inequality as persons compete, or use their different talents to acquire ownership, but the initial starting point is equality, that is, the principle of just deserts. Thus property may not be an equalising right.

[17] Hearn, *The Theory of Legal Duties and Rights,* p. 186; pp. 200-202.

[18] Ibid., p. 194.

[19] Fisher, 'The Archival Enterprise', p. 331 defines a residuary right of ownership in his interpretation of *Campbells Hardware & Timber Pty Ltd v CSD* (Queensland) (1996) 96 ATC 4348 at 4352.

[20] Kocourek, *Jural Relations,* p. 320.

coexistence of physical control and the manifested intent to exclude others. The person with physical control is said to have detention of that property. Detention is a form of custody. Detention of the property, personally or by a custodian, with the intention of keeping it for one's own use, is possession of that property. It denotes the power of exclusive access to the object and power of exercising control over it, in time and space. One has to have immediate physical contact, but the concept of detention need not be restricted to direct contact.[21] There needs to be evidence of intention to possess.[22] The required degree of control varies with the nature of the thing. As possession is a relationship, the claimant must manifest the intent to exclude others from interfering with the thing. If interference is proven it may result in damages, not necessarily transfer of property to the claimant.[23]

Legal possession and actual possession

In the classical view of the European jurist Savigny, acquisition and possession rests on two elements: 'animus' (the will to control) and 'corpus' (immediate power to control). In continuance of possession the control at will is considered sufficient. According to Kocourek, possession can exist when one does not have the thing with one. One can possess a car even if it is not with one.[24] Using the same reasoning, one can possess a record without physical possession.

In law the test of possession is persons having *a thing in their power* even if not owning it, for example bailees (see bailment below). Possession is an element of power. Rights of an owner depend on the continuing existence of the thing, not necessarily in their physical detention/ possession.[25]

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[21] Detention required direct physical contact under Roman law. In Roman law delivery made by a seller to the buyer's servant would only give the servant detention and the master possession. In common law the servant also has possession. Ibid., pp. 362-363.

[22] The intent in possession may be indefinite (no limiting condition) or specific, where there may be an intention to transfer possession on the occurrence of an event, for example a payment of money. Hearn, *The Theory of Legal Duties and Rights,* p. 187.

[23] Welling, *Things in the Common Law System,* pp. 26-29.

[24] Kocourek, *Jural Relations,* p. 400.

[25] Originally possession meant detention, but possession became identified with facts needed for possessory remedies. Many statutes use the term possession, for example weapons in a person's possession and deal with an intent to use or

Fisher divides possession into possession *in fact* and possession *in law*.

> As possession in fact, 'possession' means the situation where the possessor of something (usually mobile property such as 'goods' or records) has the use and occupation of which the subject matter of the possessory relationship is capable: see *Gray v Official Trust in Bankruptcy* (1991) 29 FCR 166 at 171. By comparison, legal possession is the state of being in possession in the contemplation of the law: *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166 at 171. Legal possession is that degree of possession which is recognised and protected by law: *Horsley v Phillips Fine Art Auctioneers Pty Ltd* (1996) 7 BPR [97557] at 14,371 per Santow J. Legal possession is also known as possession in law: see *Horsley* at 14,371. Two evidentiary propositions support the general utility of legal possession. These are: (1) possession in fact is prima facie evidence of possession in law; (2) possession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in law: *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166 at 171. Once again, the concept of possession is important to the archival enterprise and that it is particularly so when records are loaned or used by people. The term used for the transfer of possession is delivery. The test the legal system in Australia uses for deciding whether possession has passed is whether the person in possession has the requisite mix of intention and control over the thing.[26]

The distinction of *possession in fact* (de facto possession) and *legal possession* (de jure possession) is not universally held.[27] Kocourek also supports a right to possession over physical possession.[28] Where the notion of possession without physical possession and rights of possession as intention and 'control' are particularly relevant, is in the digital environment.[29]

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use them. Detention would be a more appropriate term according to Kocourek, *Jural Relations,* p. 402.

[26] Fisher, 'The Archival Enterprise', p. 333. 'The possession of a material object is the continuing exercise of a claim to the exclusive use of it'. Kocourek, *Jural Relations,* p. 361, footnote 2, quoting Salmond.

[27] Ibid., pp. 364-366.

[28] Ibid., p. 372. The right of possession is presented as a jural thing. The object of possessory rights is to create an infra-jural relation of a human being to a material object, which involves power under normal conditions to make unlimited use of that object. According to this view the right to possession is determined by rules of law not by physical possession.

[29] See discussion in Chapter 7.

Cessation of property in a thing

Property in a thing ceases to exist when the thing itself is destroyed. Without the 'thing', property is meaningless.[30] Decomposition and transmutation of a thing becomes a new thing, for example a work of art that is based on a theme from another work or the alteration of a record.[31] Property in a thing also ceases to exist when the owner of the property dies. The thing continues (because it is an object in common law).

Property in things is commonly acquired, transferred and disposed of by transaction, which includes purchase or sale, gift, and bailment.[32] In addition to the record as a thing that can be possessed, evidence of ownership transferred at the time of contract, the intention to transfer, dates of purchase or transfer and other rules that trigger the transfer of property, are all elements that must be captured in records.

Bailment and possession

Welling has defined bailment as:

> … a transaction whereby possession of a thing is transferred upon agreement that possession of the same thing, perhaps in an altered state, will be transferred back to the transferor or on to someone else as agreed.[33]

Bailment consists of an agreement and a transfer of property. The property transferred is possession of a thing. The agreement proposes a future transfer of possession of the thing, either to a third party or back to the transferor. Bailment can involve transfers of possession by contract or

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[30] Welling, *Things in the Common Law System,* p. 79. The owner may sue the destroyer for damages.

[31] Ibid., pp. 81-84, p. 95. The doctrine of accession is the process whereby a thing becomes either worked into a different type of thing or combined with one or more things to form a composite unit. The property in the original thing ceases to exist when the reworked product is no longer identifiable as the same item (for example grapes turned into wine or an image reworked digitally), based on physical identity only. A visual specification test has changed to a relative value test which determines a transfer of property by examining labour added to original thing. The owner of the principal thing gets the ownership of the combined thing.

[32] Ibid., p. 233. A gift is also a transaction, a non-contractual transfer of a form of property from one person to another. It is similar to other forms of transfer that are not transfers of sale such as a trust or deed. A gift requires proof of transfer; a donor's intent without consideration is hard to prove, thus proof of delivery is important.

[33] Ibid., p. 283.

by gift. The main issue in property is when does an acquisition or disposition take place.[34]

'Possession' is the essence of bailment, as ownership does not pass to another person directly. Bailment is applied to possessory interest in tangible personal property and rights and duties associated with it.[35] If bailment is applied to non-tangible objects it could be invoked to protect the rights of data owners of electronically transferred 'things', however contract is the more common form for arrangements of this kind (see 5.2.1 below, 'Rights-obligations of recordkeeping participants in personal property law').

It appears that when the notions of possession and ownership are analysed they are less concerned with actually having a thing as object physically in one's hands than with the notion of possessory rights. If this is the case then evidence of possessory rights, including the intention to possess, that arise from a legal relationship as a right to possession or as a duty not to take possession, should apply equally in the online environment.

Although an ethical element appears less obvious in personal property law that deals with exclusive possession, ownership and economic rights, property as an obligation, at least in deontological ethics, includes a notion of restriction on complete control over the thing owned.

5.2 Recordkeeping and property as a legal relationship

As analysed above the legal concepts of property, ownership and possession have a number of ramifications for recordkeeping. Ownership of a record itself depends on the properties of a record, its content and its documentary form, and its context, that is, who authored or created it, all of which determine a range of ownership or possessory rights which may include control over access and/or reproduction, sale of, as well as destruction of the record. When records were made and kept in a physical tangible medium, the common law approach has been to define them as

[34] Ibid., p. 273 and p. 346. Bailment is often incorrectly used to cover situations where one person holds possession while another person holds ownership or a right to immediate possession.

[35] Fisher, 'General Principles of Obligations', pp. 30-31. 'A relationship between two parties (the bailor and the bailee) in which ownership or property in choses in possession remains vested with the bailor and possession of the chose passes to the bailee under the process of delivery which can be actual, symbolic or constructive.'

chattels not as obligations that could be bought and sold as material property. Intellectual property, on the other hand, has always been concerned with the protection of the way an idea is expressed in a material form.

Property concepts have been evident in archival and records legislation. Simon Fisher argues that property law has always been a 'privatising' element in archives law and practice, for example the definition of a record in terms of government property.[36] In Australia what has been termed 'first generation' archival laws and also related laws such as Freedom of Information, use the language of custody, possession, and ownership of records.[37] Under the *Archives Act* 1983 (Cth) s 27, ownership of Commonwealth records remains with the Commonwealth and only the custody of the records is transferred to the archival authority. As both the archival authority and the government agency are the same legal person, ownership cannot in fact pass from one government agency to another.[38] This transfer has been interpreted as physical custody, but the issue of possession as control (legal possession: see above) could apply to records not in the physical custody of the archives.[39] An archival authority may need to gain possession of records of outsourced functions. If the

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[36] Fisher, 'The Archival Enterprise', p. 337.

[37] Chris Hurley, 'From Dust Bins to Disk-drives and Now to Dispersal: the State Records Act 1998 (New South Wales)', *Archives and Manuscripts,* vol. 26, no. 2, Nov. 1998, pp. 390-409. The differences between custody, possession and ownership are illustrated by the metaphor of the gentleman's suit of clothes, and the roles of different persons who take possession and custody of the suit and who actually owns it. See Chris Hurley, 'Appendix 2: From Dustbins to Disk-Drives: A Survey of Archives legislation in Australia', in *The Records Continuum: Ian Maclean and Australian Archives First Fifty Years,* eds Sue McKemmish and Michael Piggott, Ancora Press in association with Australian Archives, Clayton, 1994, pp. 206-232.

[38] '... records are usually owned by the Crown in right of the polity which created them or which received them in the course of official duties, and there is no legal reason why it is necessary to distribute ownership of records as between different governmental agencies. Although there may be sound administrative reasons why records management responsibilities are vested in archival institutions, these do not alter the incidence of ownership of records unless the owner of the records is a separate legal person to the archival institution'. Fisher, 'The Archival Enterprise', p. 332.

[39] The review of the *Archives Act* 1983 (Cth) indicates that a physical interpretation of custody is not appropriate for a strategy of distributed custody of records. See Australian Law Reform Commission, *Review of the Archives Act 1983*, Draft Recommendations, Paper 4, December 1997, AGPS, Canberra, 1997.

outsourced body is considered a separate legal entity from government, bailment and contract law may provide a preferable means of enforcing obligations in relation to control over the records. On the other hand, constructive possession may be relevant if the outsourced function is carried out by a legal entity that is not separate from government.

The relevance of bailment law to public archival bodies exists where an owner of records deposits these in an archive on a temporary basis, or even on a long term basis, but without the intention of transferring ownership of the records. Admittedly, as Fisher points out, this may be rare in archival practice, but the possibility remains that a bailment can be created of documents, and could apply to records held in a distributed environment.[40] Another application of the law of bailment is where documents are deposited or loaned by an institution to another person.[41]

Given the notion of intent to possess, that is, to possess an object does not require it to be physically with the claimant, possession could still be an appropriate legal term in the electronic world in relation to record ownership.

5.2.1 Rights-obligations of recordkeeping participants in personal property law

Property concepts have provided a micro-level view of records, concentrating on the role of documents as data or 'trace' rather than records as evidence maintained within a system. For example in the national archival legislation of the United States and the United Kingdom, any data can be a record regardless of physical format.[42] In Australian law, documents and

[40] 'If a bailment is created, the owner of the archived material is called the "bailor" and the archivist the "bailee". Even if there is no bailment between an owner of documents and the archivist, there can be one between the archivist (as the *owner* of documents) and the *user* of archived material, so long as possession of that material is transferred to the user.' Fisher, 'The Archival Enterprise', pp. 358-359, endnote 21.

[41] Ibid., pp. 333-334.

[42] In the United Kingdom, the *Public Records Act* 1958 (UK) s 10(1) Interpretation, '"public records" has the meaning assigned to it by the First Schedule to this Act and "records" includes not only written records but records conveying information by any other means whatsoever'. The *Federal Records Act,* 44 U.S.C. 3301, defines 'federal records' to include 'all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation

records have generally been defined as property,[43] that is, as material or tangible corporeal objects rather than as an obligation or a right which excludes the record's nature as a representation of an act which may be incorporeal.[44] If 'record as thing' in property law is limited to a material tangible object, an electronic record as a 'non-material object' may be

by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions procedures, operations, or other activities of the government or because of the informational value of data in them'. The InterPARES 1 Project, Findings of the InterPARES Project, *Global Industry Research Team Report*, CENSA, 2001, p. 8, found that '… U.S. regulatory agencies, the U.S. Code of Federal Regulations, and U.S. congressional code define records and electronic records to be any information in any format that is stored for later evidential, business, or historical purposes. They thus equate with records, all evidence or data of any type created by anyone anywhere within the business. They also do not associate records with the business processes they relate to, nor do they include the archival requirement of the record to be "fixed and set aside under the care of a qualified custodian with the responsibility of ensuring the ongoing authenticity of the record."'

[43] Statutory definitions of documents and records have centred on their physical characteristics rather than their function. For example in the former *Evidence Act* 1898 (NSW) s 14A, a 'document' is defined as 'books, maps, plans drawings and photographs', while in the same Act in relation to business records s 14CD(1) defines a 'document' as 'any record of information'. This latter definition of document has been adopted in the *Evidence Act* 1995 (Cth) and (NSW). The *Acts Interpretation Act* 1901 (Cth) s 25(c) includes in its definition of a document 'any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device'. The definition of writing is also related to being perceptible in a visible form. The *Archives Act* 1983 (Cth) s 3(1) defines a record as 'a document (including any written or printed material) or object (including a sound recording, coded storage device, magnetic tape or disc, microform, photograph, film, map, plan or model or a painting or other pictorial or graphic work) that is, or has been, kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event, person, circumstance or thing'.

[44] '"Materiality" is a vital component of a law of property, particularly as it relates to corporeal property such as paper-based records. Modern archival practice has moved well beyond the material form of the record although the law of property is closely wedded to concepts such as "possession" which depend on the materiality of the thing possessed'. Fisher, 'The Archival Enterprise', p. 358, endnote 17.

excluded.[45] However the law has begun to consider the processes that bring an electronic record into existence and to re-assess some fundamental legal principles in the light of that knowledge. For example, Canadian and Australian evidence laws have been drivers in creating a perceptible shift in the legal understanding of a record as a medium-based physical entity to a purpose view, which is much more in keeping with the understanding of a record from a recordkeeping tradition.[46]

Generally archives and records legislation has defined a public record either via a process or a property test.[47] The Australian Law Reform Commission's review of the *Archives Act* 1983 in May 1998, opted for a provenance and process approach in lieu of a property approach to ownership of records, which links ownership to the organisation on the basis of the government activity it undertakes; that is records created or received by a government agency in the conduct of its affairs, including electronic information that is used for practical activity.[48] In the *State*

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[45] The non-materiality of electronic records has led to classifying them in law as intangible objects and therefore not subject to property law. See Fisher, 'The Archival Enterprise', p. 340.

[46] See Chapter 2.

[47] 'A definition referring to the origin of records (i.e. to provenance) tends to reflect the professionally accepted definition of records (pare. 15), rather than a definition that refers to ownership. The last type, however, which has been linked with the British concept of "undisturbed custody" of records as the basis for their evidential value, is used where the intention is to include historical manuscripts and other documentary property belonging to the State.' Eric Ketelaar, *Archival and Records Management Legislation and Regulations: A Ramp Study with Guidelines,* UNESCO, Paris 1985.

[48] Australian Law Reform Commission, *Australia's Federal Record, A Review of the Archives Act 1983,* Report No. 85, May 1998, AGPS, Canberra, 1998, p. 98, recommendation 24, opts for a provenance definition of a record. It defines a record as follows, 'the term "record" should be defined as "recorded information, in any form, including data in computer systems, created or received or maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity"'. The *Archives Act 1983* s 3(1) defines a 'Commonwealth record' as (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or (b) a record that is deemed to be a Commonwealth record by virtue of a regulation under sub-section (6) or by virtue of section 22; but does not include a record that is exempt material or is a register or guide maintained in accordance with Part VIII. Australian Law Reform Commission, *Review of the Archives Act 1983*, states 'the use of a property based definition such as that in s 3(1) is not universal in archival legislation. The most common alternative is an administrative provenance definition, such as was proposed in the original

Records Act 1998 (NSW), s 3(1), record means 'any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means'. In s 3(1) of the Act, a 'State record' means any 'record made and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section', which is a process test. A process test avoids the common law question of 'materiality', and is based on the record's purpose.

In addition to the 'purpose' view of a record as an alternative to property, a record as a thing, other than as a material object, control over, rather than immediate possession, and property as an obligation, are concepts that are more suited to a non-material or 'virtual' world, because they are based on alternative understandings of property law. Property as obligation supports the duty of maintaining the inviolability of records, as exemplified in archival legislative provisions which disallow the alteration or destruction of records without archival approval or under other law.[49] In addition to the record as an object of property, the record may provide evidence of property ownership, including an intention to possess. Recordkeeping participants may be both property owners and/or holders of evidence of property rights (the latter may be an archival body).

'Intellectual property' is the broad term given to bundles of rights under law to protect and reward creative and economic investment in the creation of intangible products covering a diverse range of subjects which are the product of human industry and creativity, ingenuity, knowledge, skill and labour, and which are susceptible to commercial exploitation.[50] Colin Golvan's more expansive definition of intellectual property includes the protection of confidential information, trade secrets, passing off and trade

drafting instructions for the Archives Bill in 1974. The suggested formula was "all records of any kind made or received by any Australian [ie Commonwealth] Government agency in the conduct of its affairs". However successive drafts of the Bill in 1974-75 moved from a provenance definition through a custodial definition ("a record that is held in official custody on behalf of the government") to the present property definition'.

[49] See for example *Archives Act* 1983 (Cth) s 26, and the *State Records Act* 1998 (NSW) s 21(1)(d). Fisher, 'The Archival Enterprise', p. 355.

[50] Julia Baird, 'Introduction to Some Intellectual Property Issues in Information Technology', in *Computers and the Law, 94/42, Papers Presented for the Continuing Legal Education Department of the College of Law on 6 July 1994*, Sydney, CLE Department of the College of Law, Sydney, 1994, pp. 1-28.

practices protection.[51] Copyright is a category of intellectual property concerned with the protection of ideas or the way that ideas are expressed. It is a form of personal property which can be bought, sold (assigned), rented (licensed), or passed onto heirs like any other property. As intangible products they are closer to representing notions of records as evidence of rights rather than as physical objects.

Copyright law: an example of rights and duties

Copyright has been designed to protect 'the form of expression' of ideas not the ideas themselves (there is a limited protection for ideas under copyright law), principally by controlling the copying and reproduction of 'creative works' which, subject to case law, generally require minimal creativity. In the United Kingdom and the United States the courts have interpreted facts as not sufficiently creative to be protected by copyright law.[52]

The copyright owner has a number of exclusive rights to do and to authorise others to do specified acts in relation to **'**protected works and other subject matter'. Copyright includes rights that prevent third parties from making uses of intellectual property they do not own. If the third party does use or copy another person's intellectual property without

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[51] Colin Golvan, *An Introduction to Intellectual Property Law,* Federation Press, Sydney, 1992. p. vii. Originally the concept of intellectual property was only applied to copyright and was contrasted with 'industrial property' which covered patents, industrial designs and trademarks. Now all these areas are considered to fall within the ambit of intellectual property.

[52] The US Supreme Court in *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991) rejected a breach of copyright for data from a telephone directory's white pages, stating that facts cannot be copyrighted, and that lists of names, addresses and telephone numbers in alphabetical order, are not sufficiently creative to qualify for copyright protection. The *Feist* case concluded that data in a telephone directory is not protected by copyright because it fails the test of originality. The Australian case *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112 (15 May 2002) supports copyright of facts on the basis of the 'industrious collection' test for subsistence of copyright. 'The reasons in Feist provide no ground for concluding that Telstra's various forms of labour (collecting/receiving, verifying, recording, computer-aided assembling) should not suffice to attract copyright protection.' From Black CJ, Reasons for judgment. In the Australian case the originality of facts depended on how much work or 'industry' went into producing them, while in the United States, the claim of copyright protection of facts was rejected on the basis that they were found not to be sufficiently original to warrant protection.

permission the legal term is infringement. There are certain statutory exceptions for non-copyright owners. These are referred to as 'fair dealing' in Australia, and as 'fair use' in the United States.[53] In addition to 'economic' rights there are 'moral' or natural rights which are personal to the author. Both sets of rights are recognised in the *Berne Convention for the Protection of Literary and Artistic Works*.[54] Moral rights protect the work from distortion, mutilation and denigration and require that credit be given when the work is used. Moral rights legislation includes the right of attribution which helps to protect the author's ideas; the right not to have falsely attributed another's name to a work or to an altered work; and the right of integrity which is the right not to modify a work in a way that is prejudicial to honour and reputation, or create contextual misuse that is prejudicial to the author.[55]

Copyright must be expressed in a 'material form' but it is independent of the ownership of the object itself. It is a good example of a right-duty thing, that is, it is not the material object itself that is owned, but the way it is presented. Material form 'includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation can be reproduced'.[56] Material form is analogous to the archival concept of documentary form that carries information in its structure, which is separate from the medium on which it is stored. Copyright protects the arrangement or structure of the work and is therefore dependent on the integrity of the work.

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[53] Unlike the position in Australia, in the United States a person can use fair use for a purpose other than one of the listed purposes. Australian Copyright Council, *Access to Copyright Material in Australia and the US,* Information Sheet G087v01, Australian Copyright Council, Strawberry Hills, NSW, September 2004, p. 4.

[54] 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' WIPO, *Berne Convention for the Protection of Literary and Artistic Works,* 9 September, 1886, art. 6, bis (1), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 1986.

[55] For example, in Australia: *Copyright Amendment (Moral Rights) Act* 2000 (Cth); in Canada: *Copyright Act* R.S. 1985, c. C-42, ss 12(1) and (2), 14(1) and 28(2) and in the United States (which limits moral rights to visual art): *Visual Artists Rights Act* 1990 (VARA). In Europe moral rights are more broadly protected by ordinary copyright law.

[56] Galvin, *An Introduction to Intellectual Property Law*, p. 5.

Copyright distinguishes between authorship and ownership; the creator/author is generally the first owner of copyright. As noted in the previous chapter, the definitions of author and creator do not equate with their archival definitions. Statutes in different jurisdictions will vary as to definitions of copyright authors and owners and their rights regarding reproduction, distribution, transmission, performance, adaptation, copying and in what form (for example electronic), what material form is being protected (literary or other work), and what is a direct or authorising infringement.

Intellectual property law provides a good example of balancing rights and obligations of interested parties. Balancing the interest of the creators (or producers) and users (consumers) of intellectual property with the interest of the community as a whole is a central tenet of copyright law. The concept of public interest is an essential element of the web of legal relationships in the legal and social relationship model and clearly includes intellectual property. The ethical aspect of intellectual property is particularly evident in moral rights legislation that upholds the integrity of a work, and is based on a duty of respect for the reputation of the author.

Copyright law affects recordkeeping participants in relation to establishing authorship and ownership, including transfer of ownership of copyright, right of access to records protected by copyright and protecting the integrity of the content in its material form. Recordkeeping agent metadata or intrinsic elements of documentary form which identify 'authors' and 'creators' and their intentions are essential to providing evidence of authorship and copyright ownership, as much as for the identity and reliability of the evidence regarding these matters.

Contract law has also become important to intellectual property arrangements involving electronic information delivery. Contracts permit one or more third parties to use (license) the intellectual property on payment of a fee, which is often based on the amount of usage. Rather than selling the intellectual property, the owner licenses it. It is equivalent to renting out property. Contracts allow the owner to keep the copyright. However outside of contracts, copyright law automatically applies for infringements of owners' rights.[57]

[57] Most intellectual property matters never reach a court hearing. Minor infringements are ignored, as owners of copyright feel uncertain about pushing their rights in court. Copyright has succeeded in preventing illegal copies in large profitable markets and is seen as protecting big commercial interests rather than the interests of individual creative persons. See Lance Rose, *Netlaw: Your Rights in the Online World,* Osborne McGraw-Hill, Berkeley, 1995, p. 88.

Intellectual property is therefore relevant to legal and social relationships in which the record is the 'form' protected by copyright, but more importantly it also provides evidence of the identity of the 'author' and 'user' in relation to a copyrighted work, which by definition includes the record's context and structure.

5.2.2 Ownership rights in records

Ascertaining ownership rights in records

There is a complex array of relationships relevant to the ownership of even a single document. In fact, given the nature of ownership, property and possession, it is preferable to speak in terms of ownership rights in a document, linked to its creation and use. The complexities are compounded by legal definitions of documents, information and records and the different functions they all perform. For example, under present Australian copyright law, records, archives and databases as compilations are 'literary works', and records are defined within the category of an unpublished original 'literary work'.[58] The author of a literary work (other than in an employment situation and certain other exceptions) is the owner of the copyright in the work, in the absence of an agreement to the contrary.[59] Intellectual property only protects the form in which data is expressed, rather than the data itself, which means that individual data in a record would not have copyright protection, unless it is found to be 'original'.[60]

Relevant issues in common law include the fact that information per se has not been regarded as property and 'statements' are treated separately from a document or a record in which they are recorded. While physical records have been defined as 'chattels', ownership of the chattel may not give rights over the intellectual content of the record. 'Replevin' and the recovery of 'stolen records' are legal methods for regaining control over records. However they are notions based on physical possession of the record which may be difficult to apply in the electronic world.

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[58] Australian government records are unpublished original 'literary works'. See case law on Crown copyright in Simon Fisher, 'Government and Rights Protection in Commercial Contexts', in *Government Law and Policy, Commercial Aspects*, ed. Bryan Horrigan, The Federation Press, Leichhardt, NSW, 1998, pp. 150-151.

[59] In Australian law in most employment situations, employees do not hold copyright in their work. See *Copyright Act* 1968 (Cth) s 35(2) and (6).

[60] See footnote 52 above.

The matrix in Chapter 4 provides a number of actors that can be used to assist in the analysis of ownership rights in a record, to avoid confusing access or privacy rights with ownership. A commonly held assumption is that anything recorded about an identifiable person must be 'owned' by that person. Email in recent times is a good example of the erroneous belief of 'employee ownership' which is confused with the right to privacy.[61] Records that organisations create in the course of their business that contain personal details are not 'owned' by the data subject or record writer (usually the employee) but by the legal author. The data subject or the record writer may have a right of non-disclosure of that data (privacy rights) or an access right to it (under Freedom of Information), but not a proprietary right. In establishing 'ownership rights' to records many issues need to be considered. These include legal concepts of ownership in the legal system in which the recorded action took place (see 5.1 above, 'Property as a legal and social relationship'), which may involve more than one jurisdiction; the 'form' or structure in which records are required to be captured by the legal system, and the business context in which the recorded action took place. Ownership also depends on the 'competencies' (authority) of the parties to the action; their public or private character which determines what areas of law apply and the nature of their relationship, for example records may be held in fiduciary trust on behalf of a client; and whether the information has been provided under a statutory obligation, a personal favour, a subpoena, a contract, or as an employee duty or under payment. Generally, outside of the employer-employee relationship, ownership of the content remains with the author, that is, the person who created the work. A work copied or reproduced by a third party without the permission of the author could be an infringement of the intellectual property of that author.

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[61] The right of employees to email privacy and the need of businesses to access email they 'own' as records, are examples of the confusion between ownership and privacy rights. See Monash University, *Electronic Mail Recordkeeping Protocol*, 2001. Para. 5.1 relates to authorised university staff's right to inspect email on university servers. It differentiates between Monash business and private business. Email that is official in nature is university business, created and owned by Monash (including intellectual property rights). Personal privacy for Monash staff as employees applies to them as data subjects, not as record creators. In diplomatics terms they are only writers. However, the distinction between record creator/author/writer and data subject is not universally held. According to some European interpretations if an employee chooses to use an official email system for private correspondence it does not change the private nature of that correspondence. See Chapter 2, footnote 128.

In different organisational contexts it may be necessary to make specific decisions about identifying ownership of proprietary information.[62] Rather than legislating proof of ownership of data or a record, the law provides various rights to have it protected from other interests. In addition to property law, areas of law relevant to exercising ownership rights over ideas, data, records or products, include contract, trade practices legislation, trade secrets, torts (breach of confidentiality, trespass), and equity (breach of fiduciary duty). Trademarks, patent and copyright law may be used to protect unauthorised access to records from competitors. Otherwise copyright provides limited protection for information in records for businesses. Property law is less likely to be applied to electronic records because if its dependence on possession of a record as object.

Confidential information and ownership in ideas

The property right in confidential business information is usually based on a contractual agreement between the employer and employee and/or the employer and a service provider. If there is no contract, tort or equity law may apply. A breach of confidence in tort needs to demonstrate a duty of confidentiality to the claimant on the part of the person alleged to have breached the confidentiality, although it also covers information that has accidentally fallen into hands for which it was not intended.[63] A remedy in the tort of breach of confidence provides a means of protecting ownership of ideas in records. It is however only enforceable if certain conditions are met. These conditions include a relationship which has to have a quality of confidence or secrecy, there has to be restricted dissemination of the idea, the parties need to be aware of the confidentiality, that is the nature and manner of communication, and that there was or may be an unauthorised use of the information.[64]

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[62] In Australia and Canada, the government through the legal entity of the Crown, owns copyright in public records and government publications. In the United States copyright law does not extend to any work of the United States government. In a medical context in Australia a doctor may not own the patient record if he/she is an employee. See Livia Iacovino, Ethical-Legal Frameworks for Recordkeeping: Regulatory Models, Participants and their Rights and Obligations, PhD Thesis, Monash University, Melbourne, 2002, Chapter 9 for examples of ownership in specific contexts.

[63] Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State,* LexisNexis Butterworths, Chatswood, NSW, 2005, pp. 17-18.

[64] Smith, Graham J.H. and contributors (eds), *Internet Law and Regulation: A Specially Commissioned Report*, F.T. Law & Tax, London, 1996, p. 23. See

In a government context in the British parliamentary tradition, access to information acquired by virtue of office includes obligations of confidence to the Crown as employer, as well as to persons who supply the information.[65]

Trade secrets and ownership in ideas

Information a business does not want competitors to know of or revealed may be protected as a trade secret. A trade secret is defined through case law. 'The cases indicate that the term means a device or a specific formula used in business which gives a person an opportunity to gain an advantage over competitors who do not have access to it'.[66] To be a trade secret there has to be a substantial element of secrecy in the sense that the information must be difficult to obtain by others except by improper means. The information does not have to be technical, and can cover marketing strategies. It can be classified as a harm to a business (tort), and remedies include an injunction to stop information being used and claims for damages through courts can be instituted. Courts protect trade secrets when the owner or the company makes sure, usually through a contract, that all those with access to the information agree to keep it secret. Once information becomes public the company cannot sue anyone who learns about it afterwards for further disclosing the information. The information has lost its status as a trade secret. Contract law provides the strongest protection for a trade secret and for commercial confidentiality.[67]

Recordkeeping systems are vital to establishing proprietary interests in data and records (in particular data on owners, on consultants and employees including confidentiality agreements, evidence of assignment of copyright, and other contextual information which support authorship).

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also Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity', in *Government Law and Policy, Commercial Aspects,* ed. Bryan Horrigan, The Federation Press, Leichhardt, NSW, 1998, pp. 383-384.

[65] Ibid., p. 383.

[66] W.B. Lane and Nicolee Dixon, 'Government Decision Making: Freedom of Information and Judicial Review', in *Government Law and Policy, Commercial Aspects,* ed. Bryan Horrigan, The Federation Press, Leichhardt, NSW, 1998, p. 108.

[67] Rose, *Netlaw: Your Rights in the Online World,* p. 114. In the United States lawsuits on breaching confidentiality obligations are common because businesses cannot sustain the loss of valuable information.

5.3 Access rights as legal and social relationships

5.3.1 Access as a property relationship

Generally access rights in the recordkeeping context have been dealt with as separate from property rights. However Fisher points out that access is also a kind of property relationship. 'Whatever the form of the "record" (whether materialised or immaterialised, paper-based or electronic), the access regime affecting records draws in part on the language of ownership and of property law (as well as the law of obligations) to facilitate its operation.'[68]

Access has been expressed as a separate right to ownership, for example in Freedom of Information (FOI) laws, and yet it is *a* right of ownership, which owners give up. Ownership is a form of control over information and how it is used. Secrecy (and the sacred nature of matters for some groups), privacy, confidentiality, permissions, and freedom of information, are all ideas about restricting access and use to allowable circumstances or on the other hand compelling access, that is forbidding someone from denying access when it is asked for. Negative rights of access include unauthorised access, including alteration of data, and unauthorised interception of electronic information.[69] Determining who can see something and under what conditions is access policy governing use. It is this meaning of access that is of relevance in determining the rights and obligations of recordkeeping participants, within legal and social relationships.

5.3.2 Copyright and access

In the definitions of ownership provided by Hearn, Welling and others, access was considered as a right of ownership. Thus the rights of copyright owners have been used to deny access to records and have had significant effects on the rights of those seeking information from records. It has become one of the most contentious issues in the area of privacy rights in

[68] Fisher, 'The Archival Enterprise', p. 332.

[69] In Australia unauthorised access to electronic records has been addressed in computer crime legislation. See Gordon Hughes, 'Reassessing Victoria's Computer Crime Laws', *Law Institute Journal*, vol. 75, no. 7, Aug. 2001, pp. 50-55.

patient data with attempts to do away with any form of property right by the creator of the record.[70]

In terms of third parties providing access to copyrighted works, there are special copyright exemptions for archives and libraries for the provision of copies of records to users, and educational statutory licences for copying.[71] Duration of copyright in unpublished works which includes records as literary works may be perpetual with exceptions for copying.[72]

5.3.3 Government obligations and access to public records

Statutory rights of access to government records (FOI, privacy, and archival/recordkeeping legislation) compete with a right to personal privacy and the need to ensure certain kinds of information are kept secret.

Archival access

In Australia and the United Kingdom statutory schemes within government for giving public access to records began with access arrangements for older records through archives and records legislation. This has found expression in the thirty-year rule which has been adopted by most national archival regimes. Archival institutions are legal actors with rights and responsibilities to a number of persons (also with Crown immunities in Westminster systems), which include the public and other government bodies. However in relation to transactions between the public and

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[70] National Electronic Health Records Taskforce, *A Health Information Network for Australia, Taskforce Report*, Commonwealth of Australia, July 2000, Part 5 'Difficulties associated with Electronic Health Records'.

[71] See Australia, *Copyright Act 1968* (Cth) Part VB, 'Reproducing and communicating works by educational and other institutions'; Canada and the United States respectively, Canadian Intellectual Property Office, Copyright Circular No. 13, *Exceptions for Libraries, Museums and Archives,* September 1999, and 17 *Copyright Act* U.S.C. s108.

[72] In Australia copyright begins to run with publication. A copy of a work made available as a result of an archives or library provision is not considered published in relation to copyright duration. Australian Copyright Council, Information Sheet G23, *Duration of Copyright,* February 2005, 'Unpublished literary, dramatic and music works'. The Australia/US Free Trade Agreement (AUSFTA) includes a range of provisions which required changes to the Australian Copyright Act. These included changes to the period of copyright protection (in general, from author's life plus fifty years to life plus seventy years). Australian Copyright Council, Information Sheet G087v01, *Access to Copyright Material in Australia and the US,* September 2004.

government agencies, that is the 'business of government', archival institutions are third parties, as they are not the parties in the transaction, except in their own business transactions.

Freedom of Information legislation

Access to government records via FOI is a notion based on political and legal rights. There are a number of reasons why citizens have a legal right to government information in democratic societies. Firstly citizens cannot make reasoned choices within the political process without access to information that documents government actions. Secondly they need to know their rights and obligations which require access to records in which they are the subjects of the action. FOI promotes greater government transparency and accountability which counteracts government secrecy, a feature of all bureaucracy, identified by the German sociologist and organisational theorist Max Weber in the late nineteenth century.[73] Public access rights have to be considered in terms of the impact of administrative law on recordkeeping in terms of accountability, that is administrators being required to provide reasons for decisions, the reality of political interference in watering down access rights, and the relationship of accountability and recordkeeping as crucial in the areas of privacy and access.

The United States enacted the Freedom of Information Act in 1966, while in Australia, the passing of the Commonwealth Freedom of Information Act 1982 formed part of a range of reforms in the area of administrative law designed to improve government accountability.[74]

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[73] Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, eds Guenther Roth and Claus Wittich, trans. Ephraim Fischoff [and others] [Wirtschaft und Gesellschaft], New York, Bedminster Press, 1968. As Sweden had Freedom of Information laws since 1766, Weber's theories did not actually initiate them, nor did he advocate them. However, his understanding of bureaucracy and its inherent secrecy provides one of the best theoretical justifications for Freedom of Information laws.

[74] Administrative law deals with the legal means of curbing the administrative powers of ministers of state, and includes concepts of natural justice and fairness. For a summary of the background to Freedom of Information and its origins in Australia, and comparisons with other countries, see Australian Law Reform Commission, *Freedom of Information,* Issues Paper 12, AGPS, Sydney and Canberra, 1994, Chapter 2.

Australia was the first national Westminster style government to enact FOI legislation.[75]

FOI has generally applied to the public sector only. In Australia, under FOI citizens have an enforceable statutory right of access to documents in government, that is, government must grant access to documents on request and if access is denied the citizen may apply to a court or tribunal which can review the decision and order the release of the documents if it thinks fit. The overall approach is similar in each jurisdiction in Australia, and similar models are found in other countries.[76]

FOI Acts usually specify how access must be applied for and the time limit within which a request must be handled, how access must be given, for example the right to inspect a record, make a copy, or charges incurred. In the case of electronic records, one is often entitled to have the data in a human readable form.[77]

Access may be not only to 'official' records, but also to work diaries, note books and paintings. In the *Freedom of Information Act* 1982 (Cth), as long as they are created or received by an officer of the agency, they are a document of the agency for the purposes of the FOI Act. It is a provenancial rather than a property definition.[78] There are usually various review mechanisms if access is denied.[79]

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[75] Canada enacted FOI at the federal level in 1983 (*Access to Information Act* 1983), Ireland in 1997 (*Freedom of Information Act* 1997), and the United Kingdom in 2000 (*Freedom of Information Act* 2000).

[76] Freedom of Information legislation is found in all Australian states, the Australian Capital Territory and the Commonwealth. Many of the Acts are a result of government enquiries into corruption. There are variations in the legislation but generally they are modelled on the Commonwealth Act. See: *Freedom of Information Act* 1982 (Cth); *Freedom of Information Act* 1982 (Vic); *Freedom of Information Act* 1989 (NSW); *Freedom of Information Act* 1989 (ACT); *Freedom of Information Act* 1991 (Tas); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1992 (Qld); *Freedom of Information Act* 1992 (WA).

[77] *Freedom of Information Act* 1982 (Cth) s 20, Forms of access.

[78] Definition of 'document of an agency' in *Freedom of Information Act* 1982 (Cth), 4 Interpretation, document includes: (a) any of, or any part of any of, the following things: (i) any paper or other material on which there is writing; (ii) a map, plan, drawing or photograph; (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; (v) any article on which information has been stored or recorded, either mechanically or electronically; (vi) any other record of

Freedom of Information and archival access

The interrelationship of archival/records and freedom of information legislative regimes, and which laws take precedence, must also be taken into account in relation to access rights to records. For example, in the Commonwealth of Australia, the Australian Security Intelligence Organisation (ASIO) is an exempt body under the FOI Act, but not under the national archives law; thus ASIO records that are more than thirty years old are open, subject to some continuing exemptions, but records that are less than thirty years old cannot be accessed under FOI.[80]

In Australia the basic difference between FOI and archival access schemes has been twofold. First, FOI involves making a request which is acted upon by agency staff, who have to identify the documents which satisfy that request, whereas archives' clearance procedures may 'release' records automatically after a period of time, for example thirty years, whether or not anyone wants to see the document. Access-examined records are available on demand and may be searched by the applicant personally who is able to decide for herself/himself whether or not the documents are of interest. Again the archival agency is a third party, while access under FOI is usually provided by the agency responsible for the record, which may or may not have authored the record. In terms of the legal relationship model there is therefore likely to be an external party involved in access provision, for example the archival authority for government records more than thirty years old.

Freedom of Information and commercial confidentiality

FOI has recognised a need to protect commercial information held by government, balanced with the right of the public to know how government is involved in business. For example, in Australia commercial information is protected as third party information under FOI law. The *Freedom of Information Act* 1982 (Cth) s 43(1) has a number of self-contained exemptions to prevent disclosure of information supplied to government by outside persons and organisations. The information is protected either as a business and commercial interest, supplied in confidence, as a trade secret exemption, or as information of a commercial

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information; or (b) any copy, reproduction or duplicate of such a thing; or (c) any part of such a copy, reproduction or duplicate.

[79] For example, *Freedom of Information Act* 1982 (Cth), s 54 Internal review; s 55 Applications to Administrative Appeals Tribunal; s 56 Application to Tribunal where decision delayed; and s 57 Complaints to Ombudsman.

[80] *Freedom of Information Act* 1982 (Cth) Schedule 2, s 7, Pt I, Exempt agencies.

value that may adversely affect a business or profession. The third party affected is consulted, and if the information is released and the affected party opposes the disclosure, an appeal using 'reverse FOI' may be pursued.[81]

5.3.4 Access rights to private and corporate records

Private records are considered personal property, and thus access to the non-owner is a privilege. Under common law, access to private records is usually only available via a subpoena or a pre-discovery order, unless there is a contractual obligation or a proprietary right of access to particular data or information. In other cases specific rights may be available under statute.

Case law generally indicates the difficulty in gaining access to a private record. For example, in *Breen v Williams* (1996) 186 CLR 71, the High Court of Australia maintained that the patient record remained the property of the doctor, and the patient had no right of access to their clinical records. This is an example of a proprietary right being used to prevent access to information about the data subject.

The right of access to information is as much an issue of social justice as a legal one, so that the denial of access is often seen as an issue of equity. In the networked environment where more and more information is being bought and sold, particularly government information outsourced to private hands, the notion of commercial ownership of information is winning the day.[82]

5.4 Privacy and legal and social relationships

Privacy, like intellectual property, is another example of balancing the needs among a number of participants: the record creator, the recipient of the communication, the record subject(s), the researcher, the preserver and other third parties including the recordkeeping professional with the public interest needs of law enforcement and other agencies. All recordkeeping participants have legal obligations to protect information about individuals

[81] Lane and Dixon, 'Government Decision Making: Freedom of Information and Judicial Review', pp. 106-118.

[82] See Chapter 6. For a detailed discussion on outsourcing government activities in the Australian context see Iacovino, Ethical-Legal Frameworks for Recordkeeping, pp. 369-393.

in records under statute and common law, which may be distinct from their moral duties. The statutory obligations are found in freedom of information, privacy and recordkeeping legislation, and common law duties of confidentiality, contractual and other special relationships, balanced with the correlative rights of access to information by the record subject or a third party. In addition to legislation, recordkeeping and other professionals adhere to principles of confidentiality in relation to records under their control through their professional codes and through the implementation of access policies.[83] The protection of privacy is a fundamental principle in recordkeeping practice.

Privacy in the recordkeeping context is concerned with personal data that is captured in a record, or that can be linked in such a way as to identify a person. The linkage issue is of particular concern in a network system. The record subject's informed consent to the collection, use and disclosure of his/her personal information is an essential element of privacy protection and must be obtained by all recordkeeping participants.[84] However, the business model of professional service reinforced by competition policy has in some instances moved the onus of professional responsibility from an individual onto the business, for example to disclose or not to disclose personal information.[85]

5.4.1 Definitions of privacy

Privacy is recognised in international conventions as a human and a legal right. The *International Covenant on Civil and Political Rights* 1966[86]

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[83] For example, International Council on Archives, *The International Code of Ethics for Archivists*, 6 September 1996, Code 7.

[84] Consent depends on the capacity of the person to consent 'unambiguously', and therefore have moral agency. On consent by a patient in the medical context, see Bernadette McSherry, 'Ethical Issues in Health*Connect's* Shared Electronic Health Record System', *Journal of Law and Medicine*, vol. 12, no. 1, Aug. 2004, p. 63.

[85] For example, the *Information Privacy Act* 2000 (Vic) s 68 makes the employer not the individual employee responsible for breaches of privacy, and the *Privacy Act* 1988 (Cth) defines a recordkeeper as the agency.

[86] The Department of Foreign Affairs and Trade, *International Covenant on Civil and Political Rights*, Australian Treaty Series, 1980, no. 23 (Reprint), AGPS, Canberra, 1998. The covenant is an international instrument based on the 1948 directive of the United Nations, *Universal Declaration of Human Rights*, Article 12. See Australian Human Rights Centre, *Universal Declaration of Human Rights*, 1948 and Council of Europe, *European Convention on Human*

provides a definition of privacy which emphasises personal integrity and dignity. Two clauses in the covenant relevant to privacy are:

- no one shall be subjected to arbitrary and unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and
- everyone has the right to protection of the law against such interference or attacks.

The *International Covenant* provides a definition of privacy in terms of personal autonomy, integrity and dignity. In 1969 a distinguished jurist, Sir Zelman Cowen, later a Governor General of Australia, wrote 'a man without privacy is a man without dignity; the fear that Big Brother is watching and listening threatens the freedom of the individual no less than prison bars.' [87] Although he was concerned with listening devices he also feared the 'womb to tomb' dossier and the potential harm of inaccurate, out of date or incomplete information. Cowen expressed the need for personal space and anonymity that must be balanced with participation in society, and therefore the acceptance that absolute privacy could not exist.

Privacy must also be distinguished from confidentiality which is both an ethical principle and a legal duty not to disclose personal information received in confidence. However, the duty of confidentiality may be overridden by statutory duties to disclose or public interest disclosure in common law.[88] In the United Kingdom, case law has expanded the duty of confidentiality to information which has wrongfully fallen into the hands of a person who had no right to it.[89] In *R v Department of Health Ex Parte Source Informatics Ltd* it was found that even the disclosure of de-identified patient data without patients' consent breached confidentiality, unless a high public interest value in disclosure could be demonstrated.[90]

Rights, as amended by Protocol No. 11, Council of Europe Treaty Series, No. 5, Strasbourg, 1998.

[87] Zelman Cowen, 'The Private Man', *The Institute of Public Affairs*', vol. 24, no. 1, January-March, 1970, p. 26-27.

[88] Law Book Company, *Laws of Australia* (Lawbook on Line), LBC Information Services, North Ryde, NSW, Chapter 4, Privacy, para. 93 (accessed April 1998).

[89] Paterson, *Freedom of Information and Privacy in Australia*, p. 17.

[90] In a 1999 English Court of Appeal case, *Source Informatics Ltd* requested permission from the UK Department of Health to allow general practitioners and pharmacists to provide it with statistical information on their prescribing habits, extracted from their patient data, in order to sell the information to drug companies. The request was dismissed on the grounds that the disclosure would be a breach of confidentiality even if the data were de-identified, unless *Source*

On the other hand, privacy is a much wider concept than confidentiality. It is concerned primarily with an individual's ability to exercise control over his or her own identifiable personal data, based on the ethical principle of autonomy that requires a self-determining individual to be a free moral agent.[91] Rights in relation to privacy are therefore principally about controlling information others hold about an identifiable person and include:

- access to and correction/amendment of personal data, and
- how, why and by whom it is collected, handled, stored, transferred and re-used, whether it is held in a database, a recordkeeping system, and/or a network server.

The identity of parties to the transaction or information which makes it possible to infer the identity of the data subject would constitute personal data, subject to its ambit in privacy legislation.

The right to privacy in the legal relationship model includes the duty not to disclose, and thus diminishes the right to free speech. The balancing of the right of access to personal information by third parties with the obligation to protect it, like the protection of intellectual property and the right to access creative works, is at the heart of modern privacy law.

5.4.2 Recordkeeping principles: conflicts with privacy

Recordkeeping concerns regarding privacy centre on records that may need to be retained to ensure that the rights and obligations of those affected by the business transaction are protected, and that the related identity metadata are also retained. Long term corporate and collective

Informatics Ltd could demonstrate a high public interest value in the disclosure, for example for medical research. As the disclosure was not found to be in the public interest the application for judicial review was dismissed. If the English case is followed, a confidential relationship at least between a healthcare provider and patient continues to protect patient information from third party disclosure, where a patient has not consented to other uses, unless there is a demonstrable public interest in its disclosure. Whether or not the data is de-identified the potential harm to the patient arises from the breach of trust caused by the lack of consent for uses of personal information other than that for which it was intended. See *R v Department of Health Ex Parte Source Informatics Ltd* [1999] 4 All ER 185, in Medical Law Reporter*, Journal of Law and Medicine,* vol. 8, Aug. 2000, pp. 27-30.

[91] Moira Paterson, 'Health*Connect* and Privacy: A Policy Conundrum', *Journal of Law and Medicine*, vol. 12, no. 1, Aug. 2004, p. 81.

memory also depends on reliable and authentic evidence. In this context privacy law does not always accommodate recordkeeping principles of reliability and authenticity over time. It may not take account of the record's functional context and the effect of the lapse of time on de-sensitising personal information.[92] Instead it encourages the deidentification or the destruction of records containing personal information no longer required for their immediate use, the deletion of inaccurate information, and anonymous transactions.[93]

The deletion of inaccurate personal information can in fact lead to the absence of evidence of the incorrect data used in further action.[94] It is therefore preferable that the correction is made via a notation rather than by deleting the inaccurate data.[95] These issues have been of concern to archivists internationally, and in countries that form part of the European Union, in particular.[96] In Italy, specific legislative action to allow for the retention of personal data that is in the public interest, and the adherence to

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[92] The archival notion of 'lapse of time', which varies for categories of records has been one of the major arguments supporting the eventual disclosure of personal information to third parties.

[93] The 'deletion principle' is found in the Australian Privacy Charter Council, *Australian Privacy Charter*, 1994. It appears in the *Privacy Act* 1988 (Cth) as amended, in NPP 4.2.

[94] Danielle Laberge, 'Information, Knowledge and Rights: The Preservation of Archives as a Political and Social Issue, *Archivaria*, vol. 25, Winter, 1987-88, pp. 44-50. This article provides a case study on the destruction of young offenders' judicial files to protect their privacy, which led to the lack of evidence of their mistreatment. Her conclusion is that the potential abuse of individuals requires the retention of personal data and related program details, at least for the life of a person, in order to redress both individual and collective wrongs.

[95] Of particular relevance in the light of record integrity is the retention of amended personal information, in Australia's *Freedom of Information Act* 1982 (Cth) s 50(3): 'To the extent that it is practicable to do so, the agency or Minister must, when making an amendment under paragraph (2)(a), ensure that the record of information is amended in a way that does not obliterate the text of the record as it existed prior to the amendment'.

[96] In Sweden, the *Personal Data Act* 1998 s 3 defines personal data as, 'all kinds of information that directly or indirectly may be referable to a natural person who is alive'. There is also a specific provision to allow personal data to be retained for longer than necessary for its original purposes. Section 9 states that: 'Personal data may be kept for historical, statistical or scientific purposes for a longer time than stated in the first paragraph (i)'. Para (i) states that 'personal data is not kept for a longer period than is necessary having regard to the purpose of the processing'.

ethical codes for both archivists and researchers using personal data appears a possible model to follow.[97]

5.4.3 The transaction model and privacy protection

One way of looking at the handling of personal data in Privacy Acts from within a recordkeeping perspective is a transactional rather than a collection model.[98] The transaction model is a recordkeeping approach which is particularly appropriate to legal and social relationships. In a data collection model all personal data passes from one person (natural or corporate) to another. It passes from a data provider to a data collector to a data controller to a recordkeeper; terms used in the OECD *Guidelines on Privacy* and in privacy legislation.

In a transaction model the transmission of data between two parties involves communication between them in the course of transacting 'business'. Each party would keep copies of its outgoing communications as well as the communications which it receives from the other party. Each party is both a data provider to the other and a data controller of information provided by the other, all of whom have responsibilities for protecting personal data.

Recordkeeping metadata such as an identification number and other personal identification details that may be kept separately in an electronic system from the informational content gathered on an individual, together may comprise identity that 'can reasonably be ascertained' about an individual and which constitute personal information as defined by most Privacy Acts.[99] Even in paper recordkeeping systems, personal data that

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[97] Paola Carucci, 'Privacy and Historical Research in Italy', *Archivum,* vol. XLV, 2000, pp. 161-169. The requirement for the destruction of personal data under privacy law has been modified in Italy by decree 281/1999 which allows the preservation of personal data for historical, scientific and statistical research. Health and sensitive personal data are restricted for seventy years, and other sensitive data for forty years. For records that are less than thirty years old, application on an individual basis is available, with an ethical code for both the researcher and the archivist to abide by. Although decree 281/1999 has been repealed by 196/2003 (30 June 2003), the provisions dealing with historical, scientific and statistical research have remained substantially the same.

[98] I would like to acknowledge Chris Hurley for the useful distinction that he made between 'transaction' and 'collection' privacy models while giving guest lectures at Monash University in the Bachelor of Information Management, in 1996.

[99] Graham Greenleaf, 'Privacy Principles: Problems in Cyberspace - Likely Areas of Controversy and Interpretation', in Papers from *The New Australian Privacy*

would further identify an individual may be found in related control records, and not on the face of the record. It is the linking of identifying data at the system level that may infringe personal privacy. At the same time the metadata is part of the identity and integrity of the record. The transaction view of privacy highlights time-bound elements of the record essential to its authenticity. From a recordkeeping view, identifiable personal information within a business transaction, either in relation to parties to a transaction or record subjects, or other third parties who may also hold authentication information relevant to the record's reliability, are elements of identity essential to the reliability and authenticity of the record both at the time of creation and over time. Privacy Acts do not operate within a transaction model, but a collection model that makes the assessment of their impact on recordkeeping over time problematic.[100]

5.4.4 Statutory and legal remedies for the protection of personal privacy

Data protection regimes that aim to protect personal privacy are based on the OECD *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* which provides the internationally accepted definition of personal data as '… any information relating to an

Landscape, Faculty of Law, Continuing Legal Education, The University of New South Wales, 14 March 2001, pp. 9-11. In Australia 'personal information' is broadly defined in the *Privacy Act* 1983 (Cth) Part II, s 6 as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.' Greenleaf interprets the definition to include other sources than those that are immediately apparent, for example a person's identification data (ID). The ID number and identifying details may be kept in a separate database from a record that only consists of the ID number and the relevant action data. In fact the person metadata (ID number and identifying details) should be inextricably linked to the record, even if for access purposes they are not linked. Greanleaf in fact suggests a definition based on 'any information which enables interactions with an individual on a personalised basis'.

[100] Livia Iacovino, 'Identity, Trust and Privacy, Some Recordkeeping Implications in the Context of Recent Australian Privacy Legislative Initiatives', in *Convergence, Joint National Conference, Conference Proceedings*, the Joint National Conference of the Australian Society of Archivists and the Records Management Association of Australia, 2-5 September 2001, Hobart, 2001, pp. 71-90.

identified or identifiable individual (data subject)'.[101] The European Union Directive 95/46/EC states that '"personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.'[102]

Privacy regimes vary as a result of differences between juridical systems, government policy, and the timing of legal enactments in relation to privacy. In Australia statutory rights of access to, and protection of personal privacy in government and private sector records are found in FOI, privacy and records/archives legislation, thus requiring an understanding of the privacy provisions of all three statutory regimes in all Australian jurisdictions.[103] The general approach in Australian Privacy Acts is to create rights in those laws, but to implement them through FOI laws.[104] Privacy legislation in Australia does not follow a uniform model law.[105]

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[101] OECD, *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data,* OECD, 1980, Annex to the Recommendation of the OECD Council, 23 September 1980, Part 1 General, Definitions, b.

[102] The European Parliament and the Council of the European Union, *Directive 95/46/EC On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data,* 24 October 1995, Chapter I, General Provisions, Article 2 Definitions, (a). Countries that are members of the European Union use similar definitions of personal data, but there are some significant differences. For example Italy extends its definition of personal data to legal persons, bodies or associations thereby protecting corporate privacy (Article 1 c).

[103] The intersection of Freedom of Information and Privacy Acts in Commonwealth legislation is found in the *Freedom of Information Act* 1982 (Cth) s 41 which protects privacy in the 'personal information' exemption. 'Personal information' cannot be disclosed if considered unreasonable and related to a third party. There is also an amendment right in ss 47A and 50(3) to have incomplete, incorrect, out of date and misleading information corrected. There are also privacy provisions in all Australian state FOI Acts under 'personal affairs' exemptions and some states have their own privacy acts. For a detailed analysis of the Australian privacy regimes, see Iacovino, 'Identity, Trust and Privacy, Some Recordkeeping Implications in the Context of Recent Australian Privacy Legislative Initiatives', and Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State,* pp. 22-30.

[104] The Australian Law Reform Commission's review of the *Freedom of Information Act* 1982 (Cth) in 1995 concluded that the Act had been the main

In the European Union the emphasis has been on reconciling archival and privacy laws[106] as Freedom of Information laws have been of more recent origin except in Scandinavian countries. In the United Kingdom the enactment of Freedom of Information in 2000 followed closely on the Data Protection Act 1998.

The United States clearly distinguishes Freedom of Information from privacy legislation. The federal *Privacy Act* of 1974 (5 U.S.C. Sec. 552a) regulates the collection, maintenance, use and dissemination of personal information. It prohibits disclosure of individual information to a federal agency or person, except with written approval by the affected person. There are, however, several exceptions to this rule. Individuals may have access to their own records, and can request amendments to correct inaccuracies. Many individual states and industry sectors have their own

vehicle for access and amendment of personal information rather than the Privacy Act, and that the destruction of incorrect personal information was generally not implemented. The review also considered whether to remove the privacy provisions from FOI legislation and place them into the *Privacy Act* 1988 (Cth). Australian Law Reform Commission, *Open Government: a Review of the Federal Freedom of Information Act 1982,* Report 77, Australian Government Publishing Service, Canberra, 1995.

[105] Most Australian state privacy legislation, for example, *Information Privacy Act* 2000 (Vic) follows the Commonwealth model, with the exception of New South Wales's *Privacy and Personal Protection Information Act* (NSW) 1998. However health privacy legislation is inconsistent across Australian jurisdictions. See Moira Paterson and Livia Iacovino, 'Health Privacy: The Draft Australian National Health Privacy Code and the Shared Longitudinal Electronic Health Record', *Health Information Management Journal,* vol. 33, 2004, pp. 5-11. The impetus for extending privacy legislation to the private sector in both Australia and Canada arose from the 1998 implementation of EU *Directive 95/46/EC* restricting personal information from member countries to other countries unless adequate privacy safeguards were in place. Rather than enacting new legislation the Australian federal government extended its existing public sector legislation to the private sector by incorporating national privacy principles (NPPs) into the Principal Act, the *Privacy Act* 1988 (Cth).

[106] See Marina Giannetto, 'Principi Metodologici e Deontologie Professionali nel Codice Degli Archivisti e Degli Storici', in *La Storia e la Privacy, Dal Dibattito alla Publicazione del Codice Deontologico*, Proceedings of a Seminar in Rome 30 November 1999, Central State Archives and the Bianchi Bandelli Association, Ministry for Cultural Property and Affairs, General Management of the Archives, 2001, pp. 55-90; Decree 281/1999 of 30 July 1999, pp.92-125. See also footnote 97.

privacy laws.[107] In contrast to the European Union, Australia and Canada, the United States has not sought to regulate the information practices of private organisations through legislation.

Some common law jurisdictions have developed a tort of privacy. There is no common law tort of privacy in the Australian legal system, although recent case decisions are moving in this direction.[108] This contrasts with the United States and New Zealand which have recognised a broadly defined right of action in tort for invasion of privacy. Common law therefore plays an important part in protecting privacy rights in these two jurisdictions.

5.4.5 Privacy persistence: records/archival legislation

Privacy regimes focus on consent to the collection, use and disclosure of personal information in its immediate context,[109] while archival regimes focus on preservation of authentic records for general public disclosure, which may include personal information once it has lost its sensitivity. Within a records continuum reading, privacy is addressed not only in terms of how personal information is captured, used and disclosed, but also when it is destroyed or preserved and made accessible, both during the life and after the death of an identifiable person. Highly personal records, for example tax, social security and medical records, rarely survive beyond their statutory limits of retention, and thus archival legislation also protects privacy through authorised destruction. For these reasons restricting access to current information of a personal nature has a different dimension to retention and access to records that have lost their personal sensitivity.

Unlike some EU countries (the United Kingdom and Sweden) and the Canadian federal privacy law where privacy is limited to living persons, in Australia there has not been a clear determination on when privacy ceases. For example, does it persist after death and for how long?[110] In Australia,

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[107] Robert Gellman, 'Does Privacy Law Work?', in *Technology and Privacy: the New Landscape,* eds Philip Agre and Marc Rotenberg, MIT Press, Massachusetts, 1998, pp. 193-218.

[108] Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State,* pp. 17-19. Protection under the common law for privacy in Australia is available in relation to trespass, nuisance, defamation, and breach of confidentiality.

[109] The principle that personal information should only be used or disclosed for its primary or original purpose addresses the objective of Articles 6(1)(b) and 7 of the European Directive *Directive 95/46/EC*.

[110] However, in some state privacy laws, limits of time are placed on the protection of privacy, for example in the *Privacy and Personal Protection Information*

archival/records legislation for the public sector has adequately protected personal information for the lifetime of the person by restricting access to information that has continuing sensitivity beyond thirty years.[111] In the private sector there is no exemption for records of a profit-making private archive or a business entity wishing to provide access to older records unless they are *deposited* in a designated public institution.[112] Presumably the assumption behind this exclusion is that these records will have been de-identified or destroyed well before they are thirty years old and those of long term value will have been transferred to a public institution.

Act 1998 (NSW) s 4.3 (a) 'personal information' does not include 'information about an individual who has been dead for more than 30 years.' In the case of personal health information in a state archive, the *State Records Act* 2000 (WA) s 49(2) sets a hundred year limit to protecting personal medical information from disclosure.

[111] In the *Privacy Act* 1988 (Cth) s 6(f), Commonwealth records as defined by subsection 3(1) of the *Archives Act* 1983 (Cth) that are in the open access period for the purposes of that Act are exempt and do not have to be in archival custody. See definition of a record in the open access period in the *Archives Act* 1983 (Cth) s 3(7) 'a record is in the open access period if a period of 30 years has elapsed since the end of the year ending 31 December in which the record came into existence'. Privacy continues to be protected through the *Archives Act* 1983 (Cth) under s 33(1)(g): 'Information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).'

[112] *Privacy Act* 1988 (Cth) s 6(1) Interpretation "'record'…does not include: …(e) anything kept in a library, art gallery or museum for the purposes of reference, study or exhibition or (f) Commonwealth records as defined by subsection 3(1) of the Archives Act 1983 that are in the open access period for the purposes of that Act; or (fa) records (as defined in the Archives Act 1983) in the custody of the Archives (as defined in that Act) in relation to which the Archives has entered into arrangements with a person other than a Commonwealth institution (as defined in that Act) …' See also *Information Privacy Act* 2000 (Vic), s 11 (1)(b)-(d), *Health Records Act* 2001 (Vic) s 15 and the *Health Records and Information Privacy Act* 2002 (NSW) s 4(3) c 'personal information' exemptions for private records that are more than thirty years old, if they are deposited in a public institution as defined by their respective legislation. In the case of *Information Privacy Act* 2000 (Vic) and *Health Records Act* 2001 (Vic) private records held by any 'not-for-profit' organisation are exempted regardless of age.

5.4.6 Other mechanisms of control over privacy

In addition to statute and common law there are codes and guidelines that complement privacy legislative regimes, for example direct marketing codes of practice, and insurance and internet industry information privacy principles.[113] Data sharing protocols, which specify responsibilities of the sharing partners, also complement legal regimes for privacy.[114]

The role of trusted third parties in protecting privacy over time should not be overlooked. In the public sector this has been in part the role of government archival authorities. In the private sector a balance between destruction and protection of privacy may hinge on protecting individual rights in case of litigation. Technology can also be used to protect personal information without destroying it. For example, 'redactibility' which allows a version of the record that has had the personal data removed for research use still ensures the integrity of the original record.[115] A recordkeeping system which is designed to be secure, time bound and linked to retention and access procedures, should provide adequate privacy protection for the data subject, while ensuring that any rights of the data subject are protected without the need to delete the personal information once it has served its purpose.[116]

If records are handled by professionals (business and recordkeeping) who understand both their legal and ethical duties, and as confidential relationships, privacy is much more likely to be protected than by

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[113] Nigel Waters, 'A Comparative Analysis of Australian Privacy Laws with Special Reference to the Concept of "Adequacy" for the Purposes of the European Union Data Protection Directive', in Papers presented to *The New Australian Privacy Landscape*, Faculty of Law, Continuing Legal Education, The University of New South Wales, 14 March 2001 (no pagination).

[114] United Kingdom, Department for Constitutional Affairs, *Public Sector Data Sharing: Guidance on the Law*, November 2003. A data sharing protocol is a formal agreement between organisations that are sharing personal data. It explains why data is being shared and sets out the principles and commitments organisations will adopt when they collect, store and disclose personal information about members of the public.

[115] David Bearman, *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations,* Archives and Museum Informatics, Pittsburgh, 1994, 'Appendix: Functional Requirements for Recordkeeping Systems, Requirement 13, Redactable', p. 304.

[116] The Commonwealth of Australia, Attorney-General's Department, *Privacy Protection in the Private Sector,* Discussion Paper, Sept. 1996 Office of Information and Publishing, Attorney-General's Department, Barton, ACT, recommended adding the deletion principle to the Information Privacy Principles.

legislation alone.[117] However it will still depend on the ethical behaviour of those who control the identifiable data. Recordkeeping controls on unauthorised disclosure of private details of identifiable persons must be secured if the recordkeeping profession is to argue for the continued retention of personal information beyond its immediate use. Trusted third parties, from archival authorities to professional and industry regulators, as well as the users, contribute to the web of trust that protects personal information.

Technology, for example record redaction, and mediated trust through business, recordkeeping professionals and other trusted third parties, can support privacy based on recordkeeping principles that keep, rather than de-identify, the metadata relating to the author, recipient and/or record-subjects so that the transactions are reliable and authentic. The right of access to personal information needs statutory backing; however the accuracy of the information depends on reliable record creators, and keeping the metadata that identifies their professional competencies and their delegations. In the online environment the identity of the record creators also provides trust and legal validity to the content of the business transaction.

5.5 Legal relationships and evidence

Evidence defined in relation to its legal meaning includes more than documentary evidence. 'Evidence consists of the testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case'.[118] Records are, however, in their own right, evidence of business and social activity which are governed by a range of accountability mechanisms, including government authorities, legislation, policy, standards and best practice for recordkeeping.[119] However their legal value is of considerable importance.

> The evidence of a fact is that which tends to prove it - something which may satisfy an enquirer that the fact exists. Courts of law usually have to find that certain facts exist before pronouncing on the rights, duties and liabilities of the

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[117] Professional ethics and personal researcher undertakings based on a human dignity test are proposed in Eric Ketelaar, 'The Right to Know, the Right to Forget? Personal Information in Public Archives', *Archives and Manuscripts*, vol. 23, no. 1, May 1995, pp. 8-17. See also Italy footnote 97 above.

[118] J.D. Heydon, *Cross on Evidence,* 5th edn, Butterworths, Sydney, 1996, p. 13.

[119] See Chapter 1.

parties, and the evidence they receive in furtherance of this task is described as 'admissible evidence'.[120]

Within the broader values of recordkeeping to society, legal evidence is only one use of a record. Evidence is essential to enforcing rights and obligations, and to the notion of records as a right-duty thing that evidences a legal and social relationship.

In voluntary relationships evidence that a party assumed the obligation expressly or by implication is needed. Even in involuntary relationships an obligation requires proof of its fulfilment or its failure, for example evidence of action to show one acted with duty of care. This is why intentional action is an attribute of a record. Evidence law, as procedural law, is the overriding legal consideration in demonstrating in court that a right or obligation exists, or what Fisher refers to as the 'remedial' obligation when the substantive obligation, has not been performed.

Even though there is a presumption in Australian and Canadian evidence law that established business practices produce reliable documents, there is no guarantee in advance that they will be admitted or not challenged.[121] Records made subsequent to a duty to an employer are likely to be reliable as they arise from a professional duty, which is important in trustworthy professional relationships.[122] In addition, the ethical behaviour of recordkeeping participants contributes to the accuracy of the record and is therefore more likely to be admissible in legal proceedings.

5.5.1 Recordkeeping obligations arising from the legal process in common law systems

Documents that are relevant to a case may be admitted into court by parties to a case tendering them, by the issue of a subpoena to the adverse party or to a third party to produce documents, the use of interrogatories, search warrants, and discovery.[123] An order for discovery may also be made

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[120] Heydon, *Cross on Evidence,* p. 1.

[121] See Chapter 2, 'Evidence law and trustworthy records'.

[122] The judgment in the Court of Appeal, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.

[123] Discovery in common law originates in equity; it is now ruled by Rules of Court. Through discovery parties to proceedings are able to obtain from each other a written list of documents which may be relevant to the proceedings and which are or have been in the possession, custody or control of the party making discovery. Philip Sutherland, 'Documentary Evidence', in *The Principles of Evidence, 94/43, Papers Presented for the Continuing Legal*

against a person or body who is not a party to the proceedings.[124] It should be noted that one might be in contempt of court if a document is destroyed before a subpoena is issued if it is clearly relevant to proceedings that have commenced.[125]

The legal concepts of access, privacy, ownership and evidence are generic to all relationships. However these concepts can also be used to analyse the rights and obligations of recordkeeping participants - professional and business. Property law can apply to records as right-duty things, which evidence the legal relationship, rather than as mere physical objects. The record as evidence of the intent to possess or of a property right including intellectual authorship, or of a duty, depends on elements of identity. Access and intellectual rights and obligations provide examples of the different needs of recordkeeping participants. Privacy protection has to be balanced with the need to retain identity information over time to establish rights and obligations. Using the rights and obligations approach attributes the responsibility for the creation, documentation and preservation of evidence to a range of parties within a web of relationships, which include the author and recipient, data subjects and third parties, that are equally applicable to the online environment. Other substantive law will only apply to specific kinds of relationships, and these are referenced in the chapters that follow.

Education Department of the College of Law, 9 July 1994, Sydney, CLE Department of the College of Law, Sydney, 1994, pp. 1-55.

[124] National Archives of Australia in cooperation with the Attorney-General's Department, the Office of Government Information Technology and the Tasmanian Department of Premier and Cabinet, Information Strategy Unit, *Records in Evidence, The Impact of the Evidence Act on Commonwealth Recordkeeping,* Commonwealth of Australia, 1998, 'Compliance with subpoenas and orders for discovery', p. 7.

[125] Chris Hurley, 'Recordkeeping, Document Destruction and the Law (Heiner, Enron and McCabe)', *Archives and Manuscripts*, vol. 30, no. 2, Nov. 2002, pp. 6-25; Camille Cameron, 'The Duty to Preserve Documents Before Litigation Commences', *Archives and Manuscripts*, vol. 32 no. 2 Nov. 2004, pp. 70-89. Also US-InterPARES Project, *Findings on the Preservation of Authentic Electronic Records,* Final Report to the National Historical Publications and Records Commission, 2002, pp. 87-88.